No. 80-1968

Office-Supreme Court, U.S.
FILED
MAY 7 1981
ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DAVID RUSSELL HUDSON, Petitioner

v.

UNITED STATES OF AMERICA and its Secretary of the Interior, THOMAS S. KLEPPE, and, VERNADINE REED STEARNS, LOIS JEAN REED SAXTON, MILDRED REED ANDERSON, and IVAN STACY REED CLEVELAND, Defendants.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

# Petition for Writ of Certiorari

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## Question Presented

Does the United States District Court have jurisdiction to review the decision of the Secretary of Interior on the estate of an intestate Indian when the Secretary violates statutory procedural requirements which affect the decision.

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## Opinions Below

The opinions of the District Court for the Western District of Washington at Tacoma and the opinion of the Court of Appeals for the Ninth Circuit are attached hereto.

## Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on February 10, 1981, and a copy thereof is appended to this petition in the appendix. The jurisdiction of this Court is invoked under 5 U.S.C. Sections 710 and 702, 23 U.S.C. Section 2201, 28 U.S.C. Section 1361 and 28 U.S.C. 1254(1).

## Statutes, Federal Rules and Regulations Involved

1. Petitioner asserts jurisdiction under 5 U.S.C. § 702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

2. Petitioner believes that 25 U.S.C. § 372 is not a bar to review.

> When any Indian to whom an allotment has been made, or may hereinafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent and his decision thereon shall be final and conclusive. (emphasis added)

3. Petitioner believes that an interpretation of 25 U.S.C. § 372 would deny petitioner equal protection and due process under the Fifth Amendment of the United States Constitution.

AMENDMENT V [1791]

> No person shall be held to answer for a capital, or otherwise

> infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. Petitioner asserts that the Secretary of Interior exceeded his lawful authority by violating 5 U.S.C. § 555(d):

> The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency.

## Statement of the Case

The facts necessary to place in their setting the questions now raised can be briefly stated:

### A. Course of Proceedings

Alvin Hudson died on January 13, 1949, and on December 30, 1949, an order was entered determining the heirs of Alvin Hudson.

A petition to reopen the estate of Alvin Hudson was filed by Petitioner, David Russell Hudson, on August 27, 1968. An order was entered the next day denying the reopening of the estate.

The petitioner filed an appeal to the Secretary of the Interior and the Regional Solicitor reversed the order denying the petition to reopen on May 29, 1969. As a result, two hearings were held on June 26, 1972 and April 24, 1973. These hearings were before R.J. Montgomery,

a hearing examiner for the Secretary of the Interior. Subsequent to the hearings, R. J. Montgomery died, and without notice to the parties of the death of R. J. Montgomery, a substitute hearing examiner, Robert Snashall reviewed the record and decided the case on April 9, 1975. Judge Snashall ruled favorably to the petitioner finding that he was the child and natural heir of the decedent. A petition for rehearing was filed by the original heirs on July 7, 1975, and their petition was denied on January 21, 1976.

The original heirs, appellees herein, then filed a petition asking for review to the Secretary of Interior whose designee, The Board of Indian Appeals, reversed the decision and reinstated the original heirs on September 2, 1976. A copy of that decision is Annexed hereto in the appendix to this application. The Board of Indian Appeals found that a serious

question existed regarding the credibility of petitioner's mother and chose not to believe the mother, even though they had not heard her testimony.

The Petitioner then filed a complaint on November 4, 1976, with the United States District Court for the Western District of Washington at Tacoma. On the motion of appellees, a motion to dismiss was granted by Judge Jack Tanner on March 6, 1979. The Trial Court determined it had no jurisdiction.

Petitioner filed his notice of appeal to the Court of Appeals for the Ninth Circuit on March 14, 1979. The Court of Appeals on February 10, 1981, sustained the determination of the Trial Court that it had no jurisdiction to review the decision of the Secretary of Interior.

B. Relevant History and Facts

David Russell Hudson, the illegitimate son of Alvin Hudson, has made claim to the entire trust estate of his father, who was a full blooded Quinaielt Indian, Allottee Number 1139.

That the petitoner is the son of Alvin Hudson and Helen Paskas, now Helen Jenna, and was born in Seattle, King County, Washington, on the 30th day of January, 1942. That the original birth certificate of the petitioner sets forth his name as David Russell Paskas, the son of Alvin Hudson and Helen Paskas. The birth certificate further indicates that Alvin Hudson was born in Taholah, Washington, occupation fisherman, and his residence at the time of the birth of the petitioner was Box 36, Taholah, Washington. At the time of the birth of the petitioner, the mother's mailing address was listed as 841 East 90th,

Seattle, Washington, and the usual address of the mother as 404 West Harriman, Aberdeen. That the age of Alvin Hudson was listed on David's birth certificate as 25 years. That the information for the birth certificate was furnished by the mother.

The records indicate that Alvin Hudson died intestate on January 13, 1949, at the age of 31. The mother of David Hudson, Helen Paskas Jenna, testified that she graduated from high school in Aberdeen, Washington in 1938, and from 1938 to 1942 was doing housework through referrals from the Department of Public Assistance of the State of Washington. At the time the petitioner was conceived, Helen Paskas Jenna was living with Daisy Gray at Taholah, Washington, and was doing housework for the mother and father of Alvin Hudson. It appeared that Daisy Gray was employed

by the Department of Public Assistance and she referred Helen Paskas Jenna to various housekeeping jobs at Taholah, Washington. The evidence of Helen Jenna further indicated that she became well acquainted with Mildred Hudson Reed, the sister of Alvin Hudson, and later had an association with Alvin Hudson. Her further testimony indicated that she became pregnant by Alvin Hudson and became aware of her pregnancy "about May of 1941". Although more than 32 years had elapsed, Helen Jenna's memory was quite clear in reference to the Hudson home and the Hudson family. She continued to work in the Hudson home after the child was conceived. Due to her pregnancy, she left the reservation in October or November of 1941.

After she left the reservation, Helen Jenna was employed by and lived with

Florence Hoxi who helped make arrangements with the Catholic Childrens Services in reference to placing the baby in the childrens' home. David was born in the Columbus Hospital in Seattle, Washington. During his early boyhood, David was in the Sacred Heart Home, under the Archdiocese of Seattle, was in the custody of his mother for a short time, returned to the Catholic home, and was raised in several foster homes. David's testimony of his early life in foster homes revealed unfortunate hardships which he endured during this boyhood. Finally, when David was 17 years old, he went out on his own.

When David married in 1963, he endeavored to find his true identity. Through the efforts of George Marshall, a case-worker at the Catholic Childrens Services, the Aberdeen Police Department, and an uncle, Joe Paskas, he received a letter from his mother, Helen Paskas Jenna,

dated May 16, 1965 wherein she acknowledged that she was his mother and that Alvin Hudson of Taholah, Washington, was his father. After receiving knowledge as to his true identity, he went to Taholah where he met Martha Boyer, Alvin Hudson's first counsin, and obtained information from her in reference to his father. Martha Boyer further advised David that she knew that Helen had been pregnant by Alvin, as Alvin had told her about it many years ago. On a later visit to Taholah, Washington, David Hudson, his wife, Sandra Hudson, and his family visited the home of Frank and Ellen Pickernell. Ellen Pickernell gave David a picture of his father. Sandra Hudson testified that Ellen Pickernell referred to Alvin as David's father, and further indicated that David resembled his father.

David Hudson testified that he is an enrolled member of the Quinaielt Indian

Tribe and went to the university with the aid of the Bureau of Indian Affairs.

Existence of Jurisdiction Below

The United States District Court and the Court of Appeals both held that they lacked jurisdiction to review the decision of the Secretary of Interior. Petitioner, David Hudson believes that there is jurisdiction to review the decision of the Secretary of Interior.

Congress authorized the review of the decisions of administrative agencies under the Administrative Procedure Act, 5 U.S.C. §§ 702 and 710 with the limitation of "except to the extent that (1) statutes preclude review."

The statute that authorizes the Secretary of Interior to administer intestate Indian probates in 25 U.S.C. § 372. This statute states that the decision of the Secretary of Interior shall

be final and conclusive.

The United States Supreme Court and other Federal Courts have had to construe similar withdrawal statutes. These Courts have found that if the agency clearly departs from statutory authority, the administrative action is subject to judicial review even though a jurisdictional withdrawal is otherwise applicable. Breen v. Selective Service Board, 396 U.S. 460, 90 S. Ct. 661, 24 L. Ed. 2d 653 (1970); Oestereich v. Selective Service Board, 393 U.S. 233, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968); Manges v. Comptroller, 474 F. 2d 97 (5th Cir., 1973); Graham v. Caston, 568 F. 2d 1092 (5th Cir., 1978).

The case of Accordi v. Shaughnessy, 397 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 2d 681 (1954) held that judicial review is available where the administrative agency faily to follow procedures outlined

in regulations adopted by the administrative agency. In this case we have an agency that had no rule or regulation on the use of substitute hearing examiners and operated solely under 5 U.S.C. § 555(c).

The case of Harmon v. Bruckner, 355 U.S. 579, 78 S. Ct. 433 2 L. Ed. 2d 503, (1958) used a different rational for avoiding a withdrawal statute. There the Court held that if the Secretary of the Army exceeded his powers, his actions would not constitute the exercise of his administrative discretion and would be reviewable.

## Argument

The last authoritative construction of 25 U.S.C. by the Supreme Court was in First Moon v. White Tail, 270 U.S. 243, 46 S. Ct. 246, 70 L. Ed. 565 (1926). There, the Court held that the finality

clause barred judicial review of a misapplication of law by the Secretary of Interior in administering the estate of an Indian who died intestate. The Court viewed the finality clause as applicable to all thirty-three sections of the Omnibus Indian Act of June 25, 1910. No constitutional issues were raised in the appeal. More recent decisions which have allowed review of unlawful administrative action in the face of finality clauses raise considerable doubt as to the continuing validity of First Moon's holding that § 372 bars review of errors of law. Breen v. Selective Service Board, supra.

The First Moon interpretation that the finality clause of § 372 applied to all sections of the Omnibus Indian Act has been rejected by the Supreme Court in Tooahnippah v. Hickel, 397 U.S. 598, 98 S. Ct. 1316, 25 L. Ed. 2d 600 (1970).

The Court allowed judicial review in will cases under 25 U.S.C. § 373 because, as they pointed out, it did not have finality language similar to § 372.

The Chief Justice who was the author of Tooahnippah had previously indicated doubts on whether § 372 bars judicial review of questions of law. See Hayes v. Seaton, 106 U.S. App. D.C. 1266, 270 F. 2d 319, 322 (1959) (Burger, J., dissenting.)

A recent case, Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 298 (1974), suggests that the Supreme Court would interpret the finality clause of § 372 in a manner allowing review of errors of law if this Court were to accept this case for review.

The Secretary of Interior has established a system for the determination of Indian heirship. The rules have been published as 43 Code of Federal

Regulations Part 4.

There can be no dispute that an administrative agency which promulgates regulations must scrupulously follow them. An agency may not violate its rules and if the rule is violated, the decision cannot stand. See Morton v. Ruiz, 415 U.S. 199 (1974). This standard must obviously require compliance with statutes.

The Administrative Procedure Act, 5 U.S.C. § 554, provides that the provisions of the act shall apply in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. There is no dispute by the parties that a hearing under 25 U.S.C. § 372 to determine heirship is an adjudicatory hearing under the Administrative Procedure Act.

The substitution of a hearing examiner after all of the evidence has been

received is contrary to the decisions of the Secretary where credibility is an issue. The case of Estate of Albert Attocknie, Digest of Federal Indian Probate Law, page 8 (1972) (hereinafter cited as Digest) held that where the testimony in a probate proceeding is disputed and conflicting on the questions of paternity and of the testator's competency to make a will, the factual findings of the Hearing Examiner, who had the opportunity to observe and hear the witnesses, will not be disturbed.

The findings and conclusions of a Hearing Examiner arrived at on his determination of the credibility and verocity of witnesses conflicting testimony will not be disturbed on appeal. Estate of Augustine Greybull (Cuts), Digest, page 8, (IA-D-2).

The Estate of Jackson Searle, Digest, page 8 (IA-S-2) held that the determin-

ation of heirship involved legal principles the conclusion of the Hearing Examiner may be re-examined.

Under the Administrative Procedures Act, a substitution of examiners is allowed, but only in limited circumstances. The leading case is Gamble-Skogmo, Inc. v. Federal Trade Commission, 211 F. 2d 106 (8th Cir., 1954), where the Court held that situations of examiner unavailability should not be used to deny a proper credibility examination where it could effect the outcome.

The case of Art National Manufacturers Distributing Co. v. FTC, 298 F. 2d 476 (2d Cir. 1962), cert. denied 370 U.S. 939 (1962) (decision by a substitute examiner without a de novo hearing upheld since the findings were based upon "uncontroverted" evidence and no credibility issues were involved). In Van Teslaar v. Bender, 365 F. Supp. 1007 (1973), the

Court summarized the law as follows:

> "After considering all of the cases, this Court is satisfied that the APA allows substitution of examiners without a de novo proceeding only where the original examiner is unavailable and either (1) the case is not one in which the resolution of conflicting testimony required a determination of the credibility of the witnesses or (2) if it is a case in which the credibility is involved, the parties agree to proceed without a de novo administrative proceeding."

365 F. Supp. at 1012.

In Estate of Charles White, Nez Perce Allottee No. 66, Digest, Page 2, the Solicitor specifically held that the above principles apply in Indian probate hearings. The White case involved an Indian will contest in which the initial BIA examiner of inheritance had died after conducting probate hearings, but before any determination was made. The Solicitor ordered a rehearing holding that a de novo hearing is required

credibility of the witness is involved.

In case of Withrow v. Larkin, 421 U.S. 35, 43 L. Ed. 2. 712, 95 S. Ct. 1456, stated that a fair trial in a fair tribunal is a basic requirement of due process. The due process requirement of a fair trial in a fair tribunal applies to administrative agencies which adjudicate as well as courts. See also, for the principle that a fair trial in a fair tribunal is a basic requirement of due process, the case of In Re Murchison, 349 U.S. 133 at 136, 99 L. Ed. at 942, 75 S. Ct. at 623, (1955). This doctrine applies to administrative agencies which adjudicate as well as to courts.

While the Fifth Amendment to the United States Constitution contains no equal protection clause, it does forbid discrimination by the federal government that is so unjustifieable as to be violative of due process. The federal govern-

ment like the states must govern impartially. Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 ( ). The concept of equal protection of the laws and due process of law are not mutually exclusive, both stemming from our American ideal of fairness. Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed. 884 ( ).

There must be an overriding national interest to justify a discriminatory federal statute. Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 ( ).

The United States Supreme Court has scrutinized federal Indian legislation to determine equal protection under the Fifth Amendment. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 ( ).

No rational basis exists for granting the right of judicial review to testimentary dispositions while denying the right of review for intestate succession.

## CONCLUSION

A person should be entitled to look to the courts of this nation for relief when an administrative agency adjudication clearly violates its statutory guidelines and this adversely affects a substantial property right.

The last time 25 U.S.C. § 372 was considered by the Unites States Supreme Court was 1926. Since then, the court has modified its interpretation of the Omnibus Indian Act of June 25, 1910 on the subject of review and has also expanded and modified its approach to judicial withdrawal statutes since 1926.

A person with the right of inheritance from an intestate decedent is currently denied review, while the legatee or devisee on a will is allowed review. There is not rational distinction between intestate and testate to

justify review of one, but prevent it on the other.

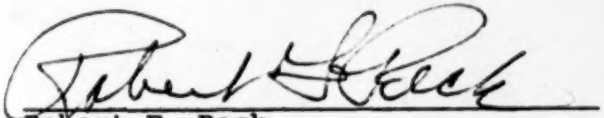
The petitioner was denied the opportunity to a fair hearing because he was denied the opportunity for a credibility evaluation of his witness when credibility was a key factor. This denial of a credibility hearing was contrary to the Administrative Procedure Act.

This is an opportune case for the Court to review a statute affecting a substantial number of citizens of Indian descent, and to extend the right to review decisions of the Secretary of Interior to those who inherit by intestate succession as well as those who take by testimentary devise, who now have the right to review.

It is also a case which merits reversal and remand for a fair hearing, including a credibility evaluation of petitioner's witnesses. Petitioner has

been denied his patrimony from birth, never knowing his father, and now cut off from recognition as his father's son.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.



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# APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| DAVID RUSSELL HUDSON, | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| vs. | ) |
| | ) |
| UNITED STATES OF AMERICA, et al., | ) |
| | ) |
| Defendants-Appellees. | ) |
| | ) |

No. 79-4305

MEMORANDUM

Appeal from the United States District Court for the Western District of Washington, Southern Division
The Honorable Jack E. Tanner, District Judge, Presiding Argued and Submitted January 7, 1981.
Before: WRIGHT, POOLE and NORRIS, Circuit Judges

Determinations of the Secretary of the Interior under 25 U.S.C. § 372 are not subject to review in federal court.

First Moon v. White Tail, 270 U.S. 243 (1926). Enactment of the Administrative Procedures Act did not alter this rule. Johnson v. Kleppe, 596 F.2d 950 (10th Cir. 1979). Appellant has raised no constitutional claim that would remove his case from that limitation. Cf. Eskra v. Morton, 380 F.Supp. 205 (W.D. Wis. 1974), rev'd on other grounds, 524 F.2d 9 (7th Cir. 1975). Dismissal for lack of federal subject matter jurisdiction was therefore appropriate.

AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

| | |
|---|---|
| DAVID RUSSELL HUDSON,<br><br>Plaintiff,<br><br>vs.<br><br>UNITED STATES OF AMERICA and its Secretary of the Interior, THOMAS S. KLEPPE, VERNADINE TEED STEARNS, LOIS JEAN REED SAXTON, MILDRED REED ANDERSON and JUAN(sic) STACY REED CLEVELAND,<br><br>Defendants. | ) |

NO. C76-227T

ORDER

Having fully considered and reviewed Defendant United States of America and its Secretary of the Interior Thomas S. Kleppe, Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to 25 U.S.C. § 372 and Defendant's Vernadine Reed Stearns, Lois Jean

Reed Saxton, Mildred Reed Anderson, and Juan(sic) Stacy Reed Cleveland, Motion to Dismiss pursuant to FRCP 12(b) for failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction, and the pleadings and memorandums filed herein,

IT IS HEREBY ORDERED that said motions are GRANTED with prejudice.

Each party shall bear their own costs and attorney fees.

The clerk is directed to send uncertified copies of this Order to all counsel of record.

DATED this (5) day of (March), 1979.

(/s/ Jack E. Tanner)
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS

4015 WILSON BOULEVARD

ARLINGTON, VIRGINIA 22203

ESTATE OF ALVIN HUDSON

IBIA 76-32 Decided September 2, 1976

Appeal from a decision denying Petition for Rehearing.

REVERSED.

1. Indian Probate: Evidence: Generally--225.0

   In order for an administrative law judge's finding to be upheld or sustained, the finding must be supported by a preponderance of the evidence.

APPEARANCES: Ziontz, Pirtle, Morriset, Ernstoff & Chestnut, Attorneys for Appellants, Lois Saxton, Vernadine Stearns, Mildred Anderson, and Ivan Cleveland; Bitar & Morgan, Attorneys for Appellee, David Russell Hudson.

OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before the Board on an appeal taken from an administrative law judge's decision denying Petition for Rehearing.

Pertinent facts relative to the matter herein are as follows:

Alvin Hudson, Quinault Allottee No. 1139, hereinafter referred to as decedent, died intestate on January 13, 1949.

On December 30, 1949, after proper proceedings, an Order Determining Heirs was issued wherein Lois Saxton, Vernadine Stearns, Mildred Anderson and Ivan Cleveland, Appellants herein and hereafter referred to as such, were found to be the heirs of the decedent.

Under date of August 21, 1968,

David Russell Hudson, hereinafter referred to as Appellee, filed a Petition to Reopen the estate with the late Hearing Examiner, Richard J. Montgomery, who had probate jurisdiction of the estate. The petition was denied by the Examiner on August 27, 1968, for untimely filing as provided by the regulations in effect at that time, 25 CFR 15.18(a).

The Appellee filed an appeal from the denial with the Regional Solicitor, United States Department of the Interior, Portland, Oregon, who thereafter on May 29, 1969, reversed the Examiner's denial and remanded the matter for further hearing.

Two hearings were held subsequent thereto by Examiner Montgomery on April 13, 1972 and April 24, 1973, wherein oral testimony and documentary evidence were presented.

Based on the record, Administrative Law Judge Robert C. Snashall on April 9, 1975, issued an order wherein he found the Appellee to be the son of the decedent and the sole heir of the decedent's trust estate. Accordingly, the Judge modified the Order Determining Heirs of December 30, 1949, by deleting therefrom the original four heirs as determined and substituted the Appellee as sole heir.

The Appellants on July 7, 1975, after a duly authorized extension of time granted by the Judge, filed a Petition for Rehearing and Reconsideration setting forth in support thereof the following grounds:

1. Allowing a late petition to reopen the estate, and entering an order reversing the original decision of the Department of Interior and determining a new heir of Alvin Hudson

is illegal and unconstitutional as more fully set out in the memorandum in support of this petition attached hereto, all parts of which are incorporated herein by reference.

2. A new trial is necessary in that the Administrative Law Judge who heard the evidence did not make the final decision.

3. The order of April 9, 1975, is not supported by the evidence adduced thus far in this matter.

4. The Administrative Law Judge erred in not applying substantive state law to determine who was entitled to take as heirs of Alvin Hudson.

5. New and additional evidence which has come to light since the original hearing should be heard. This evidence goes to two material facts involved in the case, i.e., whether or not David Paskas Hudson is,

in fact, an Indian and a member of the Quinault(sic) Tribe and the character of the decedent which is directly relevant to the paternity of Alvin Hudson.

A review of the record indicates the need to address at this time only the Appellants' contention set forth in above Item 3 to the effect that the Order of April 9, 1975, is not supported by the evidence.

The Appellee's case as we see it rests and depends entirely on the testimony of his mother, Helen Paskas Jenna, that she was raped by the decedent and that the Appellee was a result thereof. The birth certificate naming the decedent as the father of the Appellee and the court order changing Appellee's name to Hudson are likewise based on the mother's word.

It is to be noted that the subject of rape was not mentioned in the Petition to Reopen and came to light only after the petition had been granted by the Solicitor.

It was at the hearing of April 18, 1972, that the claim was first made by Mrs. Jenna that the Appellee was the result of the crime of rape. Her only reason for not reporting the alleged rape before was that she was ashamed. According to her testimony, she never divulged the incident to anyone. Not only was the alleged crime never reported or made known to anyone, the fact that she was pregnant as a result therefrom was also never made known to anyone including the decedent.

The testimony of Mrs. Jenna given some 23 years after the alleged crime raises a serious question regarding the credibility of her testimony.

This is particularly true in the absence of any corroboration.

The Judge in his decision of April 9, 1976, held that the paternity of the Appellee had been established by a "preponderance of the evidence." The Board does not agree and finds to the contrary.

[1] An examination of the record indicates the Appellee has not established his paternity by the preponderance of the evidence as found by the Judge. The Judge's finding regarding Appellee's paternity appears to have been premised or based entirely on the uncorroborated and somewhat conflicting word or testimony of Mrs. Jenna that the Appellee was the result of an alleged rape. This we do not feel meets the preponderance of the evidence standard. Lacking such preponderance, the Judge's finding to that effect cannot be upheld or sustained.

Under the circumstances attendant in this case, it does not appear that further proceedings would contribute in any substantial manner to the evidence already presented in the two proceedings held in the matter. At most, any evidence that could possibly be presented hereafter in support of the Appellee's paternity would merely be cumulative and repetitious of the evidence heretofore presented.

In view of our finding that the Judge's finding of April 9, 1975, regarding the paternity of Appellee is not supported by the evidence, we need not, as indicated elsewhere herein, consider or rule on Appellants' other contentions including the applicability of 25 U.S.C. § 371.

For the reason herein set forth, the decision of the Administrative Law Judge, dated April 9, 1975, should be

reversed and the Order Determining Heirs of December 30, 1949, reinstated.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CRF 4.1, it is HEREBY ORDERED:

(1) That the Order of April 9, 1975, is REVERSED and VACATED, and,

(2) That the Order Determining Heirs of December 30, 1949, is REINSTATED.

This decision is final for the Department.

Done at Arlington, Virginia.

(/s/ Alexander H. Wilson)
Alexander H. Wilson
Administrative Judge

I concur:

(/s/ Mitchell J. Sabagh)
Mitchell J. Sabagh
Administrative Judge

Office-Supreme Court, U.S.
FILED
JUN 25 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1968

IN THE

# Supreme Court of the United States

OCTOBER TERM 1980

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DAVID RUSSELL HUDSON,
Petitioner,

v.

UNITED STATES OF AMERICA and its Secretary of the Interior, THOMAS S. KLEPPE, and VERNADINE REED STEARNS, LOIS JEAN REED SAXTON, MILDRED REED ANDERSON, and IVAN STACY REED CLEVELAND,
Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## RESPONDENTS' BRIEF IN OPPOSITION

---

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ABCD AT CRAFTSMAN PRESS, SEATTLE

## QUESTIONS PRESENTED

A. Whether the Ninth Circuit Court of Appeals correctly concluded that the Secretary of the Interior's determination of heirs in an Indian intestate probate proceeding conducted pursuant to 25 U.S.C. § 372 was not subject to judicial review by the district court because of the statute's command that the Secretary's decision was "final and conclusive."

B. Derivatively, whether the Ninth Circuit Court of Appeals correctly concluded that the final agency decision did not raise constitutional questions avoiding the ban on judicial review in § 372. The administrative agency had overturned the ruling in Petitioner's favor of a substitute administrative law judge who had not heard the evidence, on the ground that there was, in any event, insufficient

evidence presented to sustain petitioner's burden of proof concerning his alleged relationship to the deceased Indian whose estate was probated.

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NO. 80-1968

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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DAVID RUSSELL HUDSON,
Petitioner,

v.

UNITED STATES OF AMERICA and its Secretary of the Interior, THOMAS S. KLEPPE, and VERNADINE REED STEARNS, LOIS JEAN REED SAXTON, MILDRED REED ANDERSON, and IVAN STACY REED CLEVELAND,
Respondents.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# RESPONDENTS' BRIEF IN OPPOSITION

---

## STATEMENT OF THE CASE

Petitioner David Hudson seeks review of the decision of the Ninth Circuit Court of Appeals affirming the district court's dismissal of his original complaint which had sought judicial review of an order of

the Secretary of the Interior determining the heirs in an Indian intestate probate proceeding. The decision of the Secretary of the Interior, through his designate, the Board of Indian Appeals of the Office of Hearings and Appeals, is dated September 2, 1976. (App. 3) The court of appeals held that the decision of the Secretary in Indian intestate probate matters was made "final and conclusive" under 25 U.S.C. § 372 and not subject to judicial review. (App. 1) It held further that the petitioner had failed to demonstrate the existence of any constitutional issue which would avoid the rule of nonreviewability.

The administrative proceedings began more than 30 years ago when Alvin Hudson, Quinault Allottee Number 1139, whose estate is in controversy in these proceedings, died intestate on January 13, 1949. On December 30, 1949, pursuant to 25 U.S.C. § 372 and the regulations promulgated by the

Department of the Interior, an Interior Department inheritance examiner entered an order determining heirs, naming respondents Lois Saxton, Vernadine Stearns, Mildred Anderson and Ivan Cleveland, nieces and nephews of Alvin Hudson, his sole heirs. Almost two decades later, on August 21, 1968, Petitioner David Russell Hudson filed a petition with the Department of the Interior to reopen the Alvin Hudson estate on the ground that he was the illegitimate son and lawful heir of Alvin Hudson. The petition was denied by the hearing examiner on August 27, 1968, on the ground that the petition was not filed within three years of the decision of the examiner of inheritance as required by the federal regulations in effect.

Petitioner filed an administrative appeal with the regional solicitor, who on May 29, 1969, reversed the examiner's denial on the ground that the Secretary had

discretion to reopen the estate despite the three-year limitation because of David Russell Hudson's allegation that he filed the petition within three years of the time that he learned of his alleged relationship to Alvin Hudson.[1]

The matter was remanded to Hearing Examiner Montgomery before whom two evidentiary hearings were held, one on June 26, 1972, and one on April 24, 1973.

For present purposes, the key issue at the administrative hearings concerns the credibility of Petitioner's primary witness, his mother, Helen Paskas Jenna, then Helen Paskas, who testified that Alvin Hudson was Petitioner's father. At the

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[1] One of the exhibits to the administrative record, however, reveals that the petition was not filed until more than three years after Petitioner's mother advised him by letter of his purported relationship to Alvin Hudson. See Pet. Exhibit B-12, letter of May 27, 1965.

first hearing, she testified that from February to November, 1941, she was employed as a domestic by the welfare department of the State of Washington. She testified that she worked in a number of Indian homes, including the Hudson family home where Alvin Hudson lived along with his parents and his sister and brother-in-law, Mildred and Benjamin Reed. According to Mrs. Jenna, David Hudson was conceived as a result of her having been raped by Alvin Hudson. She testified that one night in May, 1941, Alvin Hudson came home drunk, "after his mother and sister had gone to bed," and raped her in the living room where she had been ironing. (Tr. 22) She testified that she did not report the rape to the police or divulge it to anyone, that she continued to work in the Hudson home after the alleged rape had occurred. She testified further that she never had a

romantic relationship with Alvin Hudson and had never told him about her pregnancy. (Tr. 23)

A second witness for petitioner at the first hearing, however, Alvin Hudson's first cousin, Martha Boyer, testified that Helen Paskas and Alvin Hudson had been involved in a romantic relationship during the period in question and that they had lived together prior to David's birth. She testified that Alvin Hudson knew of her pregnancy and inquired about it. (Tr. 27-29)

At the second hearing, to rebut this evidence, the respondent original heirs called Benjamin Reed, Alvin Hudson's brother-in-law and Frank Pinkerell, Alvin Hudson's uncle, to testify. Reed testified that he and his wife Mildred, Alvin's sister, had lived with Alvin Hudson in Alvin's parent's home at the time in question. He stated that he did not know

Helen Paskas Jenna and that during the time the alleged rape occurred his wife Mildred had done all of the housework at the Hudson home. (Tr. 63) He testified further that because of the way the house was laid out it would have been impossible to rape someone in the living room without waking persons sleeping in the bedroom only fifteen feet away. (Tr. 66) Pinkerell testified that as Alvin Hudson's uncle and neighbor he was a frequent guest in the Hudson home and that he did not know Helen Paskas Jenna or anything about the alleged rape. (Tr. 82) He also testified that Mildred Reed, not Helen Paskas, had done all the housework at the Hudson home.

Mrs. Jenna was then recalled on behalf of the petitioner. This time, however, she testified that she had been raped in the morning, not at night as she had originally stated, and that at the time of the rape, Mrs. Hudson and Mildred Reed were not

sleeping as she originally testified, but were not at home. (Tr. 97-98) She testified concerning the layout of the Hudson home and described that there had been a bathroom off the living room where she had been raped. (Tr. 100)

On rebuttal, Frank Pickerell testified that the Hudson home did not have an indoor bathroom at the time because he had personally installed a bathroom in the house after Alvin Hudson died. (Tr. 102-103) No further corroboration of Mrs. Jenna's testimony was offered.

After both hearings had been held, but before Hearing Examiner Montgomery issued a decision, he died. Subsequently, on April 9, 1975, Administrative Law Judge Robert Snashall, who had not heard any of the evidence, rendered a decision that Alvin Hudson was the father of David Hudson based on his reading of the transcript of the hearings. Judge Snashall subsequently

entered an order divesting the original heirs and substituting David Hudson as the sole heir. On January 21, 1976, Judge Snashall denied the original heirs' petition for rehearing and the original heirs, respondents here, filed an administrative appeal to the Interior Board of Indian Appeals of the Department of the Interior pursuant to the Department's regulation. In the petition for rehearing and in the administrative appeal, the original heirs argued that Judge Snashall had erroneously overturned the original determination of heirs without hearing the contested evidence.

The Interior Board of Indian Appeals (IBIA) did not reach that issue but on September 2, 1976, reversed and vacated Judge Snashall's order of April 9, 1975, and reinstated the original 1949 Order Determining Heirs. The Board concluded

that David Russell Hudson had not established by a preponderance of the evidence that Alvin Hudson was his father. The IBIA concluded from its review of the evidence that his entire case rested on the "uncorroborated and somewhat conflicting testimony of Mrs. Jenna that the appellee (petitioner David Hudson) was the result of the rape". (App. 5) The IBIA held that Mrs. Jenna's testimony, rendered some twenty-three years after the alleged crime had occurred, was not sufficient to sustain a finding in David Hudson's favor. (App. 5-6) The issues regarding the credibility of Mrs. Jenna had been briefed extensively by the parties in the administrative appeal.

On November 4, 1976, David Russell Hudson sued the United States, the Secretary of the Interior and the original heirs in federal district court. He alleged that the IBIA erred in judging the credibility

of witnesses without having heard the evidence and that the initial decision was not valid because the officer who had decided the case had not also heard the evidence, a contention which had not been raised by petitioner in the administrative proceeding. The United States and the original heirs filed motions to dismiss for lack of jurisdiction on the ground that 25 U.S.C. § 372 precluded judicial review of the Secretary's decision. The United States and the original heirs also argued that the IBIA's decision was supported by substantial evidence. On March 6, 1979, the district court granted the Secretary's and original heirs' motions to dismiss for lack of jurisdiction with prejudice, (App. 2), and, as noted above, the Ninth Circuit Court of Appeals subsequently affirmed.

This petition for certiorari followed.

## SUMMARY OF ARGUMENT

The petition for certiorari raises no substantial legal issues. There are no conflicts between the courts of appeals or state courts of last resort with respect to the questions presented. The federal courts have uniformly held that 25 U.S.C. § 372, which makes the Secretary's decision in an Indian intestate probate matter "final and conclusive", bars judicial review by the federal courts. See Tooahnippah v. Hickel, 297 U.S. 598, 607 (1970).

Petitioner argues that a constitutional error has occurred avoiding the bar on judicial review because a substitute law judge initially heard the case. But that initial decision, in Petitioner's favor, was reversed by the agency in the administrative appeal.

The federal courts are in unanimous agreement that there is no constitutional

requirement that the ultimate decision maker on issues of fact personally hear the evidence even where the credibility of witnesses may be an important factor in deciding the issue. See United States v. Raddatz, ___ U.S. ___, 65 L. Ed. 2d 424, 435-436 (1980). Here, because the decision of the substitute administrative law judge was in Petitioner's favor, and because petitioner did not raise the issue in the administrative appeal, Petitioner should not now be heard to complain. The substitution of law judges was cured, in any event, in the administrative appeal when the agency ruled that there was insufficient evidence presented to support a decision in Petitioner's favor.

The Fifth Amendment argument concerning the asserted invalidity of the statutory distinction between Indian will and intestate cases, with respect to the

availability of judicial review, was not presented below and should not be considered.

## ARGUMENT

### The Petition for Certiorari Presents No Issues Deserving Supreme Court Review

The petition for certiorari raises no legal issues of any substance. There is no conflict between the decisions of any of the courts of appeals or state courts of last resort, no important questions of federal law presented, and no tension, much less conflict, with any decisions by this Court. The issues the petition attempts to raise are well settled.

At the administrative level, in the hearings before the administrative law judge and in the administrative appeal to the Department of the Interior's Office of Hearings and Appeals, the underlying questions of fact as to whether Alvin Hudson had raped Petitioner's mother and

whether David Hudson was the illegitimate son of Alvin Hudson were vigorously litigated. These fact issues were resolved against Petitioner at the administrative level by the IBIA. After reviewing the record it noted that Mrs. Jenna's testimony was uncorroborated and somewhat conflicting, given more than twenty-three years after the alleged crime, and never divulged to anyone. (App. 5) It concluded on its review of the record that the evidence presented by Petitioner was insufficient to meet the preponderance of the evidence standard.

The federal courts have uniformly held that the Secretary's decisions concerning Indian intestate heirship matters pursuant to 25 U.S.C. § 372 are not subject to judicial review because the agency's decision is made "final and conclusive" by the statute. See First Moon v. Whitetail, 270 U.S. 243, 244 (1926); Tooahnippah v.

Hickel, 297 U.S. 598, 607 (1970); Johnson v. Kleppe, 596 F.2d 950, 952 (10th Cir. 1979); Arenas v. United States, 198 F.2d 418, 420-422 (9th Cir. 1952). As this Court observed bluntly in Tooahnippah, "Congress quite plainly stated that the Secretary's action [pursuant to § 372] was not to be subject to judicial scrutiny." 297 U.S. at 607. The statute's ban on judicial review was preserved by § 10 of the Administrative Procedure Act which provides that administrative decisions are not subject to judicial review where the "statute precludes judicial review." 5 U.S.C. § 701(a)(1).

Petitioner's argument that the rule of nonreviewability is circumvented because an error of constitutional dimension has occurred is improperly raised and foreclosed by a recent decision of this Court. As respondents understand it, the error identified by Petitioner occurred at the

lower level of the administrative agency when Judge Snashall ruled without having heard the evidence after the death of the first administrative law judge. But since Judge Snashall's decision was in Petitioner's favor, Petitioner has failed to demonstrate how he was harmed by this alleged error, a prerequisite to successful challenge of erroneous agency action. See Codd v. Velger, 492 U.S. 624, 629 (1977). Further, not only did Petitioner fail to complain of the error before the agency, he argued before IBIA that it was proper for Judge Snashall to have disinherited the original heirs without hearing the evidence. Petitioner is estopped from changing positions now.

In addition, it is the final agency that is subject to judicial review, not the initial decision of the administrative law judge, and the federal courts have uniformly held that the agency is the ultimate

fact finder notwithstanding the fact that the appellate level of the administrative agency has not heard the testimony. The agency itself is not compelled to defer to the findings of a hearing officer even if the officer has heard the testimony. See e.g., Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951). Last term, this Court held that the due process clause of the Fifth Amendment does not require that the trier of fact personally hear the evidence in every case where the credibility of witnesses may be an important factor in the decision. United States v. Raddatz, ___ U.S. ___, 65 L. Ed. 2d 424, 435-436 (1980).

The lower federal courts have uniformly held that there is no constitutional requirements of a de novo hearing where the initial examiner is no longer present and the credibility of witnesses is at issue, see Utica Mutual Insurance Co. v. Vincent, 375 F.2d 129, 131 (2d Cir.), cert. den.,

389 U.S. 839 (1967), and in any event any error there was cured during the administrative appeal when the IBIA concluded that no purpose would be served by a further hearing since Petitioner had, in any event, failed to produce sufficient evidence to sustain his burden of proof. Since the agency could have overturned an administrative law judge who did hear the evidence, see Universal Camera Corp., supra, clearly the agency can properly overturn the substitute administrative law judge.

Petitioner's further argument that the statutory distinction with respect to the availability of judicial review in Indian will cases but not in Indian intestate cases is a violation of the Fifth Amendment was not raised before the district court or court of appeals and should not be considered here. See Youakim v. Miller, 425 U.S. 231, 234 (1976).

Finally, there was clearly substantial evidence to support the decision of the IBIA in light of the numerous conflicts in Mrs. Jenna's testimony concerning the paternity of her son and the conflicts with the testimony of other witnesses. Supreme Court review will therefore only prolong this already 30-year-old probate proceedings, without changing the ultimate result.

## CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted this 22nd day of June, 1981.

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Supreme Court, U.S.
FILED
JUL 6 1981

No. 80-1968

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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DAVID RUSSELL HUDSON, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

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## QUESTION PRESENTED

Whether 25 U.S.C. 372, which provides that the Secretary of the Interior's determination of heirs to the estate of an intestate Indian allottee "shall be final and conclusive," precludes judicial review of petitioner's claim that the Secretary violated the Administrative Procedure Act by allowing the substitution of administrative law judges (ALJs) where the original ALJ died after hearing the testimony and the substitute ALJ issued his decision on the basis of the transcript of the hearing before the first ALJ and the exhibits received at that hearing.

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1968

DAVID RUSSELL HUDSON, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-2) is not reported. The order of the district court dismissing the action for lack of jurisdiction (Pet. App. 3-4) is not reported. The opinion of the Interior Board of Indian Appeals (Pet. App. 5-14) is reported at 5 I.B.I.A. 174. The decision of the administrative law judge (App., *infra*, 1a-4a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on February 10, 1981. The petition for a writ of certiorari was filed on May 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

The Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 372, provides in pertinent part:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.

## STATEMENT

Alvin Hudson, a Quinault Indian whose estate is in controversy here, died intestate on January 13, 1949. Following his death, his estate was probated by an Interior Department Inheritance Examiner, who, pursuant to 25 U.S.C. 372, issued an Order Determining Heirship on December 30, 1949. The order provided that respondents Vernadine Stearns, Lois Saxton, Mildred Anderson, and Ivan Cleveland were Alvin Hudson's lawful heirs. Nineteen years later, on August 21, 1968, petitioner filed a petition with the Interior Department to reopen the estate, claiming that he was Alvin Hudson's illegitimate son and lawful heir. On May 29, 1969, the estate was reopened. Subsequently, in 1972 and 1973, two hearings were held before Administrative Law Judge (ALJ) Richard J. Montgomery (Pet. App. 6-7).

Petitioner's case rested on the conflicting and essentially uncorroborated testimony of his mother, Helen Paskas Jenna. She testified that while working as a domestic for the Hudson family, she was forcibly raped by Alvin Hudson. Petitioner, she testified, was born of that union. At the first

ALJ hearing, Jenna testified that one night in May 1941, Alvin Hudson came home drunk, "after his mother and sister had gone to bed," and raped her in the living room of the Hudsons' home (Tr. 22). Jenna further testified that she did not report the alleged rape to the police or divulge it to anyone, that she never told Alvin Hudson about her pregnancy, and that she continued to work in the Hudson home even after the alleged rape occurred (Tr. 18-23).

At the second hearing, Jenna altered her testimony after witnesses for the original heirs challenged her story. In response to their contention that it would have been impossible to rape someone in the Hudsons' living room while others were in the house, given the close proximity of the bedrooms to the living room, she stated that she was raped in the "morning, after Alvin Hudson's mother and sister were out of the house" (Tr. 97-98). At the second hearing, one Benjamin Reed also testified that he and his wife lived in the Hudsons' home during 1941 and that he did not know Jenna or the story regarding her alleged rape. He also testified that his wife, Mildred Reed, did the housework in the Hudsons' home during that time (Tr. 63, 66). Alvin Hudson's uncle, who was a neighbor of the Hudsons in 1941 and frequently visited their house, also testified that he did not know Jenna or anything about an alleged rape, and that Mildred Reed had done the Hudsons' housework during that time (Tr. 82).

Petitioner also introduced a birth certificate naming Alvin Hudson as his father and a court order changing petitioner's name to Hudson, which petitioner claimed established his paternity. But each of these had been procured in 1967, some 25 years

after petitioner was born, and each was likewise based on Jenna's word (Pet. App. 10).

At the conclusion of the second hearing, ALJ Montgomery took the case under advisement. However, Montgomery died before rendering his decision. The case was then transferred to ALJ Robert C. Snashall. On April 9, 1975, ALJ Snashall, on the basis of the transcript and exhibits, rendered a decision in favor of petitioner.[1] On September 2, 1976, the Secretary of the Interior, acting through the Interior Board of Indian Appeals (IBIA), reversed the decision of Judge Snashell and ordered the December 30, 1949, order reinstated. The IBIA held that Helen Jenna's "uncorroborated and somewhat conflicting * * * testimony" (Pet. App. 12) given some 30 years after the alleged rape, which she had never reported to the police or divulged to anyone, was not sufficient to sustain a finding in petitioner's favor (*id.* at 10-12).

Petitioner then brought the instant action in the United States District Court for the Western District of Washington, contending that the IBIA erred in judging the credibility of witnesses without having heard the evidence and that the initial decision was invalid because the ALJ who decided the case had not personally heard the evidence. The Secretary and the original heirs, respondents herein, moved to dismiss the action on the ground that 25 U.S.C. 372 precludes judicial review of the Secretary's decision. On March 5, 1979, the district court granted the motion to dismiss for lack of jurisdiction (Pet. App. 3-4). The

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[1] ALJ Snashall acknowledged that "it is always dangerous and normally unsatisfactory to base a question of paternity largely upon the statements and actions of the mother of the child" (App., *infra*, 2a) and that the evidence introduced by petitioner was insufficient to establish paternity under the laws of the State of Washington (*id.* at 3a, citing Wash. Rev. Code § 11.04.081 (1967)).

court of appeals affirmed in an unpublished memorandum decision (*id.* at 1-2), holding that determinations of the Secretary under 25 U.S.C. 372 are not subject to judicial review, that the enactment of the Administrative Procedure Act did not alter this rule, and that petitioner had not raised any constitutional challenge to the Secretary's determination that might give rise to district court jurisdiction notwithstanding the bar to judicial review contained in 25 U.S.C. 372.

## ARGUMENT

The decision below is correct, conflicts with no decision of this Court or any court of appeals, and presents no issue warranting review by this Court.

1. Petitioner's principal contention before this Court is that the finality clause in 25 U.S.C. 372 does not bar review of his claim that the Secretary violated the Administrative Procedure Act, 5 U.S.C. 554(d),[2] by substituting administrative law judges without requiring a de novo hearing. The argument is without merit. 25 U.S.C. 372 provides that the Secretary's determination of heirs to the estate of an Indian allottee who dies intestate before receiving a fee patent "shall be final and conclusive." The finality clause has been consistently held by this Court and courts of appeals to preclude judicial review of the Secretary's heirship determinations. *First Moon* v. *White Tail*, 270 U.S. 243, 244 (1926); *Johnson* v. *Kleppe*, 596 F.2d 950, 952 (10th Cir. 1979); *Arenas* v. *United States*, 197 F.2d 418, 420-422 (9th Cir. 1952). Petitioner's suggestion that

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[2] 5 U.S.C. 554(d) provides in pertinent part:

> The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency.

this Court has modified its approach to judicial withdrawal statutes since deciding *First Moon* (Pet. 23) is unfounded.[3] As recently as 1970, this Court reaffirmed that Section 372 bars judicial review, concluding that "Congress quite plainly stated that the Secretary's action [pursuant to Section 372] was not to be subject to judicial scrutiny." *Tooahnippah* v. *Hickel*, 397 U.S. 598, 607 (1970).

The only occasion in which an exception has been recognized to the prohibition in 25 U.S.C. 372 against judicial review has been in an action challenging the constitutionality of the laws regulating the descent and distribution of Indian trust lands. See *Eskra* v. *Morton*, 380 F.Supp. 205, 211-213 (W.D. Wis. 1974), rev'd on other grounds, 524 F.2d 9 (7th Cir. 1975). In *Eskra*, the district court, relying on this Court's decision in *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974),[4] held that the finality clause in

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[3] Petitioner's reliance on *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233 (1968); and *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460 (1970), is misplaced. In each of these cases, the Court held that statutory provisions precluding judicial review did not bar actions to review agency decisions that were clearly beyond the agency's statutory authority. In the present case, petitioner has not challenged the Secretary's authority (which petitioner invoked) to determine the heirship of intestate Indian allottees. Rather, his arguments go to the procedures followed in making such determinations, which, for the reasons discussed above, do not give rise to an exception to the finality clause in Section 372.

[4] In *Eskra*, the district court stated (380 F. Supp. at 212-213; footnotes omitted):

> The question of jurisdiction in the present matter is closely analogous to that decided in *Johnson* [v. *Robison*]. In each case, (1) the underlying dispute concerns the constitutionality of a statute which is essential to the

Section 372 does not extend to actions challenging the constitutionality of a statute that is essential to the administrator's decision. Accordingly, the court determined that it had jurisdiction to examine the constitutionality of a Wisconsin statute that would not allow an illegitimate child to inherit from his mother's relatives.

Relying upon *Johnson* v. *Robison*, petitioner argues here that the district court had jurisdiction to consider his claim that he was denied due process when the Secretary failed to hold a de novo hearing following the death of the first ALJ. Petitioner's due process claim is unfounded. The ALJ who rendered the decision after the first ALJ died ruled in petitioner's *favor*. Thus, there can be no contention that petitioner was prejudiced by the substitution of ALJs. Indeed, because he prevailed before the second ALJ, petitioner *defended* the substitution of ALJs when the original heirs appealed the second ALJ's decision to the Interior Board of Indian Appeals. In these circumstances, petitioner should not now be heard to claim that the substitution of ALJs violated due process.

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administrative decision; (2) a construction of the review provision barring the courts from consideration of the underlying constitutional claim would raise grave doubts as to the constitutionality of that provision; (3) a clear congressional purpose to bar judicial review of the constitutional question is not evident; (4) the administrative agency disclaims authority to decide the constitutional issue. *Johnson* strongly suggests that I construe the finality clause of § 372 as not extending to actions challenging the constitutionality of laws regulating the descent and distribution of Indian trust lands. I do so construe § 372 and, accordingly, I have jurisdiction under 5 U.S.C. § 702 (§ 10(a) of the APA) to review plaintiff's challenge to the illegitimacy classification.

Contrary to petitioner's contention, moreover, the Due Process Clause of the Fifth Amendment does not require that the trier of facts personally hear the evidence in every case. *United States* v. *Raddatz*, 447 U.S. 667, 678-680 (1980); *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129, 131 (2d Cir.), cert. denied, 389 U.S. 839 (1967); *Gamble-Skogmo, Inc.* v. *FTC*, 211 F.2d 106, 112-114 (8th Cir. 1954); *NLRB* v. *Stocker Mfg. Co.*, 185 F.2d 451, 453 (3d Cir. 1950). To the extent petitioner's argument rests on the contention that the Interior Board of Indian Appeals would have been bound by the credibility determinations of the ALJ (see Pet. 18-20), the argument is without merit. The Board may substitute its judgment for that of the ALJ, as it did in this case. 5 U.S.C. 557(b)[5]; *United States* v. *Raddatz*, *supra*, 447 U.S. at 680; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951); *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977); *Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380, 386-387 (D.C. Cir. 1972); 2 K. Davis, *Administrative Law Treatise* § 10.04 (1958).

2. Finally, petitioner contends that the finality clause of 25 U.S.C. 372 violates the principles of equal protection encompassed in the Due Process Clause of Fifth Amendment because, petitioner argues, there is no rational basis for precluding judi-

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[5] 5 U.S.C. 557(b) provides in pertinent part:

> On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

cial review of the Secretary's intestate heirship determinations while allowing judicial review of the Secretary's decisions to approve or disapprove an Indian's will. See Pet. 22-23; *Tooahnippah* v. *Hickel*, *supra*, 397 U.S. at 606-607. Petitioner did not raise this contention in the court of appeals, and there is no reason for this Court to depart from its customary practice of declining to review issues not raised or resolved in the courts below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, there is no merit to the equal protection argument. First, in contrast to Section 372, 25 U.S.C. 373 contains no language conferring finality on the Secretary's decisions approving or disapproving an Indian's will. Second, the coverage of the statutes varies. As this Court noted in *Tooahnippah* (397 U.S. at 606), Section 372 applies only to Indians possessed of allotments. In contrast, Section 373, as amended by the Act of Feb. 14, 1913, ch. 55, 37 Stat. 678, applies to all Indians having individual Indian monies or other properties held in trust by the United States. Third, in *First Moon* v. *White Tail*, *supra*, this Court recognized that the finality provision is justified in light of the Secretary's special responsibilities with respect to allotments: An "abundant reason for the [finality] provision becomes apparent upon consideration of the infinite difficulties which otherwise would arise in connection with the sundry duties of the Secretary of the Interior relative to Indian allotments" (270 U.S. at 244). Finally, the issues involved in the distribution of intestate estates differ from those involved in testamentary estates. Will contests often involve issues of fraud, undue influence, and competence, which do not arise in cases involving intestate distribution. Congress therefore could con-

clude that there was a greater need for judicial review in proceedings involving wills. For any or all of these reasons, Congress reasonably could distinguish between these two situations for purposes of judicial review.

Distinctions drawn by Congress that do not implicate fundamental constitutional interests or rest upon suspect classifications do not violate the principles of equal protection embodied in the Due Process Clause of the Fifth Amendment unless they are "patently arbitrary or irrational." *United States Railroad Retirement Board* v. *Fritz*, No. 79-870 (Dec. 9, 1980), slip op. 10. In addition, distinctions drawn among Indians will be sustained so long as " 'the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.' " *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977), quoting *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). The finality clause in Section 372 plainly meets this standard.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1981

APPENDIX

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

P.O. Box 3785
Portland, Oregon 97208

IN THE MATTER OF THE ESTATE OF ALVIN HUDSON

DECEASED QUINAIELT [*sic*] NO. 1139
OF THE WESTERN WASHINGTON INDIAN AGENCY
OF THE STATE OF WASHINGTON

ORDER

The above entitled matter came on for hearing on June 26, 1972, at Seattle, Washington, and again on April 24, 1973, at Hoquiam, Washington, before the late Honorable Richard J. Montgomery, Administrative Law Judge (formerly Hearing Examiner), pursuant to an Order of Remand of the Regional Solicitor of May 29, 1969 (IA-P-17), for determination as to whether the original findings as to heirs should be corrected so as to hold petitioner, DAVID RUSSELL HUDSON, to be sole heir of decedent.

An examination of the Petition, transcript of the proceedings before Judge Montgomery and other documentary evidence contained in the file lead to the following findings of fact and conclusions of law. One Helen Paskas Jenna, then known as Helen Paskas, was employed under the auspices of the Welfare Department of the State of Washington on the Quinault Indian Reservation at Taholah, Wash-

ington, from approximately April, 1941, to October or November of 1941. Throughout this period of time she lived with a Mrs. Gray, who was her supervisor, and whom directed her to perform duties of a domestic nature for various and sundry Indian families on the Indian reservation. One of the families for whom she was assigned to work was the Hudson family, one of whom was a son, Alvin Hudson, decedent herein. Alvin Hudson and Helen Paskas Jenna engaged in sexual intercourse some time in the month of April, 1941, resulting in Helen Paskas Jenna becoming pregnant and giving birth to a child, petitioner herein, David Russell Paskas, in Seattle, Washington, on January 30, 1942. By petition of the said child, his name was changed in 1967 to David Russell Hudson by the Superior Court of the State of Washington for King County and a modified birth certificate was filed in accordance with said order. Helen Paskas (Jenna) never directly revealed to Alvin Hudson his parentage of said child but the record reflects Alvin Hudson knew, or must have known, the child was his since Helen Paskas did not leave the Taholah area until late enough in the year 1941 that the fact of her pregnancy was physically obvious. Upon her leaving the reservation, she removed herself to Seattle, Washington, for the birth of her child, and later submitted the child into the hands of the Catholic Children's Services under whose auspices the child was generally raised. Petitioner, David Russell Hudson, first learned of his probable parentage in 1966. Although it is always dangerous and normally unsatisfactory to base a question of paternity largely upon the statements and actions of the mother of the child, preponderance of the evidence

clearly disclosed Alvin Hudson was the father of David Russell Paskas Hudson.

Those in opposition to petitioner's position reasonably argue petitioner has failed to meet the specific statutory requirements of the state of Washington required to establish "paternity" and therefore even given the facts above, state of Washington law proscribes paternity of the decedent as being the child of Alvin Hudson. *RCW 11.04.081 (1967)*. However, although Federal law requires the applicability of state laws of descent and distribution for admeasurement purposes in Indian trust probate matters, state laws, statutory or otherwise, are only applicable in the absence of Federal statute, regulation or legal decision. Federal authority has elected to provide that "paternity" may be established factually by mere testimony or other evidence tending to show the paternity without resort to statutory requirements of evidence such as are required by the laws of the state of Washington. *Estate of Francis Sears*, IA-1397, *Estate of Crawford J. Reed*, IBIA 326, cf: *Estate of Harry Colby*, 69 I.D. 113.

It appears, therefore, the Order Determining Heirs of December 30, 1949, is in error and should be modified so as to name as sole heir at law of the decedent herein, DAVID RUSSELL HUDSON.

NOW, THEREFORE, IT IS HEREBY ORDERED the Order Determining Heirs of December 30, 1949, is modified so as to delete therefrom as heirs of the decedent, BERNADINE REED, LOIS JEAN REED, LEDA REED, and IVAN STACY REED and insert in lieu thereof as sole heir at law of the decedent DAVID RUSSELL PASKAS HUDSON, 130-, born January 30, 1942, as son of the decedent.

IT IS FURTHER ORDERED that as hereinabove modified, the said Order Determining Heirs of December 30, 1949, is affirmed and the Superintendent of the Western Washington Indian Agency is directed to proceed with distribution of the estate property as therein fully provided and all distributions heretofore made prior to the date of this Order of monies and other personal properties are not to be disturbed and are final.

Dated this 9th day of April, 1975, at Portland, Oregon.

/s/ Robert C. Snashall
ROBERT C. SNASHALL
Administrative Law Judge

THIS ORDER WAS MADE AND SIGNED BY OTHER THAN THE ADMINISTRATIVE LAW JUDGE WHO PRESIDED AT THE RECEPTION OF THE EVIDENCE PURSUANT TO THE PROVISIONS OF 5 USC § 554.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 249943 822